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May 29, 2020

*Via FOIAONLINE.REGULATIONS.GOV*

National Freedom of Information Officer  
U.S. Environmental Protection Agency  
1200 Pennsylvania Avenue, NW (2822T)  
Washington, DC 20460

**Re: Freedom of Information Act request for communications relating to Clean Air Act enforcement relief under the Agency's COVID-19 Enforcement Discretion Policy**

Dear FOIA Officer:

I am writing on behalf of the Environmental Integrity Project to submit this request for records pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552.

**A. BACKGROUND**

On March 26, 2020, the U.S. Environmental Protection Agency ("EPA" or "Agency") released its COVID-19 Enforcement Discretion Policy (hereinafter "Enforcement Discretion Policy") through a memorandum with the subject "COVID-19 Implications for EPA's Enforcement and Compliance Assurance Program"<sup>1</sup> from Susan Parker Bodine, EPA Assistant Administrator for Enforcement and Compliance Assurance, regarding EPA's enforcement of environmental legal obligations during the COVID-19 pandemic.

**B. RECORDS REQUESTED**

This FOIA request seeks the following records held by EPA:

1. Any and all communications sent from a regulated source and received by EPA Headquarters or an EPA Regional office, from March 13, 2020 to the date the Agency conducts the search:
  - a. Notifying the Agency that a regulated entity has taken or intends to take advantage of EPA's Enforcement Discretion Policy for past or prospective noncompliance with any emission limits, monitoring and reporting requirements, or other obligations set forth in Clean Air Act permits, settlement agreements, or consent decrees.

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<sup>1</sup> Available at <https://www.epa.gov/sites/production/files/2020-03/documents/oecamemooncovid19implications.pdf>.

- b. Requesting enforcement relief from the Agency pursuant to the Enforcement Discretion Policy for noncompliance with emission limits, monitoring and reporting requirements, or other obligations set forth in Clean Air Act permits, settlement agreements, or consent decrees.
2. Any and all communications sent from EPA Headquarters or an EPA Regional office to a regulated entity, from March 13, 2020 to the date the Agency conducts the search, granting enforcement relief pursuant to the Enforcement Discretion Policy for any noncompliance with the above-referenced Clean Air Act obligations.

### **C. DEFINITIONS AND SCOPE OF REQUEST**

For the purposes of this request, the term “communications” means any correspondence (handwritten, typed, or electronic) with EPA involving a third party, including, but not limited to, emails, letters, memoranda, and notes of phone calls or other dialogue.

The scope of this request includes any communications that were initially sent from a regulated entity to an authorized state program and subsequently forwarded to EPA.

### **D. CLAIMS OF EXEMPTION FROM DISCLOSURE**

If you regard any documents as exempt from required disclosure under FOIA, please exercise your discretion to disclose them nevertheless, keeping in mind that FOIA “is the most prominent expression of a profound national commitment to ensuring an open Government” and that “[a]ll agencies should adopt a presumption in favor of disclosure.” President Barack Obama, Memorandum For the Heads of Executive Departments and Agencies: Freedom of Information Act, 74 Fed. Reg. 4, 863 (Jan. 26, 2009).

In the alternative, after careful review for the purpose of determining whether any of the information is exempt from disclosure, please provide all reasonably non-exempt portions of records and communications as required by FOIA.

Should you elect to invoke an exemption, please provide the required full or partial denial letter and sufficient information to determine whether or not there may be grounds to appeal EPA’s decision. In accordance with the minimum requirements and regulations of due process, this information should include:

- Basic factual material, including the originator, date, length, and addresses of the withheld items.
- Explanations and justifications for denial, including the identification of the exemption applicable to the withheld information or portions of the information found to be subject to exemption, and how each exemption applies to the withheld material.

## E. FEE WAIVER REQUEST

Pursuant to FOIA, 5 U.S.C. § 552(a)(4)(A)(iii), and EPA's implementing regulations, 40 C.F.R. § 2.107(l), EIP requests that all charges (e.g., search, review, and duplication fees) incurred in connection with this FOIA request be waived.

FOIA requires agencies to waive or reduce fees for requests "if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii).

"[A]ll public interest groups...will be able to qualify for fee waivers and thereby obtain documents without charge if their requests meet the standard for waivers." *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987) (quoting 132 Cong. Rec. 29,696 (1986) (statement of Rep. English)). Congress intended the fee waiver provision to be "liberally construed in favor of waivers for noncommercial requesters." *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting 132 Cong. Rec. 27,190 (1986) (statement of Sen. Leahy)).

As discussed below, EIP satisfies the two-pronged test for a fee waiver established in FOIA and outlined in EPA's implementing regulations because: (i) "disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of government," and (ii) disclosure of the information "is not primarily in the commercial interest of the requester." 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l)(1).

### **1. Disclosure of the requested information is in the public interest because it will contribute significantly to public understanding of the operations or activities of government.**

EIP qualifies for the fee waiver because the requested information will "contribute significantly to public understanding of the operations or activities of the government." 5 U.S.C. § 552(a)(4)(A)(iii); *see also* 40 C.F.R. § 2.107(l)(1), (2). Specifically, EIP meets each of the four factors that EPA considers with respect to the "public understanding" prong.

- a. The subject of the requested records concerns the operations or activities of the government, and the informative value of this information is high.

Under factors (l)(2)(i), EPA considers "**Whether the subject of the requested records concerns 'the operations or activities of the government.'**" 40 C.F.R. § 2.107(l)(2)(i). The subject matter of this request concerns the operations and activities of EPA. EIP has requested records of communications between regulated sources and EPA regarding the implementation and application of EPA's Enforcement Discretion Policy during the COVID-19 pandemic.

b. The informative value of this information is high.

Under factor (1)(2)(ii), EPA considers “[t]he **informative value of the information to be disclosed.**” 40 C.F.R. § 2.107(l)(2)(i)(ii). The informative value of this information is very high, as it will provide the public insight into a timely subject that has only recently been developing in the public understanding. The records secured from this FOIA request would provide the public crucial insight into the regulated industry’s compliance with environmental obligations during the health pandemic and into EPA’s decision-making process as it carries out its Enforcement Discretion Policy during the COVID-19 pandemic.

c. Disclosure will contribute to a reasonably-broad audience of interested persons’ understanding of the subject.

Under factor (1)(2)(iii), EPA considers “**The contribution to an understanding of the subject by the public is likely to result from disclosure.**” 40 C.F.R. § 2.107(l)(2)(iii). Considerations within this factor include that the public understanding in question be that of “a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester” and the “requester’s expertise in the subject area and ability and intention to effectively convey information to the public.” *Id.*

i. *A reasonably broad audience of persons is interested in the subject.*

The records received from this FOIA request would shed light on EPA’s decisions on if, how, and to what extent EPA will exercise the enforcement discretion specified in its Enforcement Discretion Policy, and which regulated entities may be seeking to take advantage of this policy for noncompliance with their Clean Air Act responsibilities. The information garnered from this FOIA request would be of great interest not only to those typically interested in environmental or governmental issues, but also to communities living near or around the regulated sources that are not complying with their environmental obligations. Further, as this subject concerns the COVID-19 pandemic, a virus linked with respiratory impairments, such records would be of interest to the general public and inform them of any failure to monitor, report, or perform other environmental obligations that may be contributing to excessive air pollution caused by noncompliance during this time.

ii. *EIP has demonstrated expertise in the subject area and an ability and intention to effectively convey information to the public.*

EIP is not requesting these records merely for their intrinsic informational value. After reviewing the information provided in response to this FOIA request, EIP intends to disseminate the records and use its resources and expertise to inform and educate the public, the media, and other nonprofit advocacy organizations as to EPA’s decisions on if, how, and to what extent EPA will exercise the enforcement discretion specified in its Enforcement Discretion Policy.

Comprised of former EPA enforcement attorneys, public interest lawyers, analysts, investigators, and community organizers, EIP frequently uses information it obtains through FOIA requests to analyze and simplify public information on environmental issues through the issuance of reports that are covered by media sources. In fact, EIP has a long, demonstrated, and continuing history of expertise and contribution to the public understanding on a number of topics pertaining to governmental operations. In furtherance of this, EIP distributes information via regularly published reports and press releases, its frequently updated website (<http://www.environmentalintegrity.org>) and social media platforms (<https://twitter.com/EIPOnline>; <https://www.facebook.com/EnvIntegrity/>), communication with partner organizations and outside media outlets, and legal and administrative documents such as public comments on agency rulemakings and permits and briefs and documents filed in litigation.

EIP intends to make the same dissemination in this instance. More specifically, EIP plans to publish the records and our findings on our website and to disseminate the materials to both national media sources and local outlets that may cover news for areas where any regulated entities that are taking advantage of the Enforcement Discretion Policy are located. EIP also intends to email the materials to national, regional, and local partner organizations and community groups for further dissemination to their members. As it has in the past, EIP staff members will make themselves available to news sources, partner groups, and others in order to answer any questions or discuss the records or EIP's findings. These methods of dissemination will allow the information to reach not only those typically interested in environmental or governmental issues, but also local communities living near or around the regulated sources that are not complying with their environmental obligations.

- d. Disclosure of the requested records is likely to contribute significantly to public understanding of government operations or activities.

Under factor (1)(2)(iv), EPA considers “[t]he **significance of the contribution to public understanding.**” 40 C.F.R. § 2.107(l)(2)(iv). “The public’s understanding of the subject in question, as compared to the level of public understanding existing prior to the disclosure, must be enhanced by the disclosure to a significant extent.” *Id.*

Here, the public’s understanding of EPA’s Enforcement Discretion Policy would be significantly enhanced by the disclosure of the records sought after in this FOIA request, as compared to the public’s understanding prior to disclosure. Indeed, the public does not currently have an ability to easily evaluate the requested records, which are not currently in the public domain. Disclosure of the requested records will significantly enhance the public’s understanding of the issues and influences affecting EPA’s application of its new Enforcement Discretion Policy. And as discussed in subpart c, above, disclosure of the requested records would also significantly enhance the public’s understanding of which regulated entities may be releasing excessive air pollution through noncompliance and which may not be fulfilling other environmental obligations for the public to monitor and evaluate compliance. EIP plans to use this information consistent with our past practices to simplify and provide the public access to analysis of the public information.

## 2. Obtaining the information is of no commercial interest to EIP

As to FOIA's second prong for fee waivers—disclosure of the information “is not primarily in the commercial interest of the requester”—EPA regulations set out two factors for the agency to consider. 40 C.F.R. § 2.107(l)(3). EIP clearly meets both of these factors.

As to factor (l)(3)(i), EPA considers **“Whether the requester has a commercial interest that would be furthered by the requested disclosure.”** 40 C.F.R. § 2.107(l)(3)(i). As a 501(c)(3) non-profit organization, EIP has no commercial, trade, or profit interest in the material requested. EIP will not be paid for or receive other commercial benefits from the publication or dissemination of the information requested.

Under factor (l)(3)(ii), EPA considers the requester's primary interest in the disclosure: **“Whether any identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is ‘primarily in the commercial interest of the requester.’”** 40 C.F.R. § 2.107(l)(3)(ii). Our primary interest is a public interest: in analyzing and assessing EPA's communications with regulated entities who are not complying with their environmental obligations during the COVID-19 pandemic and the Agency's decision not to take such enforcement action against such entities, and informing the public as to the activities and operations of government. Furthermore, it is clear from EIP's explanation as to the public understanding factors that there is a great deal of public interest in obtaining, analyzing, and disseminating this information.

## 3. Conclusion

For the reasons set out in EIP's FOIA request and this fee waiver request, EIP has clearly met FOIA's requirements as to fee waivers and the six factors EPA has set out to consider these requirements. *See* 5 U.S.C. § 552(a)(4)(A)(iii); 40 C.F.R. § 2.107(l). EIP is therefore entitled to a waiver of fees for its FOIA request and respectfully requests that EPA grant such a waiver.

## F. Opportunity to Provide Clarification

If I can provide any additional information or answer any questions that can help to clarify or limit this request, please do not hesitate to contact me at (202) 888-2701 or via email at [slam@environmentalintegrity.org](mailto:slam@environmentalintegrity.org).

Thank you for your assistance with this FOIA request, and I look forward to hearing from you.

Sincerely,



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